

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 08-CR-288 (SJ)

-against- : U.S. Courthouse

: Brooklyn, New York

THOMAS ARCHER
RUKHSANA RAFIQUE

Defendants : May 7, 2009

- - - - - X 9:30 a.m.

BEFORE:

HONORABLE STERLING JOHNSON, JR.
United States District Judge

APPEARANCES:

For the Government: BENTON J. CAMPBELL, ESQUIRE
United States Attorney
271 Cadman Plaza East
Brooklyn, New York 11201
BY: ANDREW EDWARD GOLDSMITH
Assistant U.S. Attorney

For the Defendant: ALOMAR & ASSOCIATES, PC
Thomas Archer 60-89 Myrtle Avenue
2nd Floor
Ridgewood, New York 11385
BY: KARINA E. ALOMAR

For the Defendant: MILDRED M. WHALEN
Rukhsana Rafique Federal Defenders of New York, Inc.
One Pierrepont Street
Brooklyn, New York 11201

1 Court Reporter: RONALD E. TOLKIN, RMR, CRR
2 Official Court Reporter
3 225 Cadman Plaza East
4 Brooklyn, New York 11201
5 718-613-2647

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7 THE COURT: Call the first one.

8 THE CLERK: U.S.A. versus Thomas Archer and Rukhsana
9 Rafique.

10 Counsel, please state your appearances for the
11 record.

12 THE COURT: Note your appearances.

13 MR. GOLDSMITH: Andrew Goldsmith for the government.
14 Good morning, Your Honor.

15 THE COURT: Good morning.

16 MS. ALOMAR: Good morning, Your Honor.
17 Karina Alomar on behalf of Mr. Archer.

18 MS. WHALEN: Good morning, Your Honor.

19 Federal Defenders of New York by Mildred Whalen for
20 Rukhsana Rafique.

21 THE COURT: As I understand it the government has
22 and I have not seen this motion, the government has made a
23 motion to take a deposition of a witness?

24 MR. GOLDSMITH: Yes, Your Honor.

25 THE COURT: Who is this witness?

1 MR. GOLDSMITH: This witness is one of the
2 individuals underlying one of the specific counts of the
3 indictment, the person for whom the defendants prepared an
4 application.

5 Ms. Rafique has filed an opposition to the motion,
6 it is my understanding.

7 THE COURT: I just got something today. So I will
8 adjourn it to look at it. I got it from Ms. Whalen.

9 MS. ALOMAR: Your Honor, I also will be filing an
10 opposition.

11 THE COURT: You have not filed it yet?

12 MS. ALOMAR: Not yet, Your Honor. I will be filing
13 it within the next two days.

14 THE COURT: Okay, you oppose it? What are the
15 reasons that you oppose it?

16 MS. WHALEN: Your Honor, I don't think that the
17 government has demonstrated Rule 15(a) that permits
18 depositions in criminal cases. You have to show extraordinary
19 circumstances, and you have to show that it is in the interest
20 of justice to allow the witness to be deposed.

21 I don't think in their application the government
22 has demonstrated the extraordinary circumstances that are
23 required to permit a deposition. Based on the indictment
24 itself I don't think it is in the interest of justice to
25 permit this witness to be deposed to avoid the judge and jury

1 scrutinizing his testimony.

2 I think that the government at this point has an
3 overall conspiracy to commit visa fraud of which this
4 individual would testify, I believe, to two overt acts. They
5 then have four individual counts of visa fraud. That witness
6 would only testify as to one count of visa fraud. My
7 understanding is that all of these visa applications are for
8 the same program. I believe that the allegations of fraud are
9 similar. So I believe that this witness, while he would be
10 helpful for the government, would be cumulative. So it is not
11 in the interest of justice to permit him to avoid testifying
12 at trial.

13 Especially because the government originally
14 filed -- the indictment we are dealing with now is a
15 superceding indictment. The original indictment had the
16 overarching visa fraud conspiracy and only three counts of
17 visa fraud. When they indicted it, when they superceded, they
18 changed the time frames of the visa fraud conspiracy and added
19 an additional count of individual visa fraud.

20 So, in effect, this witness will be gilding the
21 lily. I have real concerns about why the witness wants to
22 leave now especially since the government has not shown any
23 extraordinary circumstances. It simply looks like the
24 individual wants to go home. While I don't want to delay his
25 departure in anyway it is not the kind of compelling situation

1 that the case law has laid out.

2 MR. GOLDSMITH: A few points, Your Honor.

3 First, if the defense's argument is that the
4 witnesses' testimony would be cumulative that is something
5 that the court can determine at the time of trial. The
6 question of whether to grant the deposition is separate from
7 the question of whether the testimony will ultimately be
8 admitted. We don't think it will be cumulative but we can
9 address that later.

10 As to the circumstances, the individual who we would
11 like to depose would like to go back to his native country as
12 his wife and his child are there.

13 Part of the reason that we superceded the indictment
14 to begin with, as Ms. Whalen said, the original indictment had
15 a conspiracy charge and three individual charges. One of the
16 individuals underlying one of the individual charges, who we
17 expected to be able to use at trial, just went back to his own
18 country on his own. This witness is entirely capable of doing
19 that. He hasn't done it yet but that could happen. So the
20 government's concern is that we preserve his testimony so that
21 that does not happen.

22 MS. ALOMAR: Your Honor, if I may respond to that.
23 In this case this individual has lived in the United States
24 for a minimum of six years. The government has conceded in
25 their motion that the removal proceedings have been

1 adjourned --

2 THE COURT: Is he going back on his own or is he
3 being removed?

4 MR. GOLDSMITH: He is in removal proceedings. His
5 intention is to consent to voluntarily removal and go back.
6 He hasn't been able to do that yet because Homeland Security
7 has agreed to postpone the proceeding. The man himself wants
8 to go. Even if the proceedings continue to be delayed he
9 could just leave if he wants to, as one of our other expected
10 witnesses has already done.

11 The issue in this case, Your Honor, is that by
12 definition all of the potential -- all of the people for whom
13 the defendants filed applications don't have status in this
14 country. It is very difficult for the government to find
15 these people and keep them here and actually get them to
16 testify at trial. We have had this problem already of people
17 just going because they have family elsewhere, where they
18 don't want to stick around for this.

19 So the purpose of this motion is to prevent that at
20 least with respect to this potential witness.

21 THE COURT: Well, you are going to file a motion in
22 opposition like Ms. Whalen did, is that correct?

23 MS. ALOMAR: Yes, Your Honor.

24 THE COURT: Are you going to respond to these
25 motions?

1 MR. GOLDSMITH: I would like to, Your Honor.

2 THE COURT: I will give you, you said two days, so I
3 will give you until next Monday to file your motion. May be I
4 will give you two weeks to respond to Ms. Whalen and counsel's
5 motion. Then we will put it on for a June date.

6 How long would it take to try this case?

7 MR. GOLDSMITH: I think in the area of a week, Your
8 Honor.

9 THE COURT: All right.

10 I will look at your papers. I just got them in this
11 morning.

12 MS. WHALEN: Yes, I know.

13 THE CLERK: June 22nd, 2009 at 9:30 a.m.

14 MR. GOLDSMITH: That is for a status?

15 THE COURT: For a status.

16 Okay.

17 MS. ALOMAR: Yes, that is fine.

18 MR. GOLDSMITH: Your Honor, may we have an order
19 excluding the time from now until then?

20 THE COURT: The time will be excluded because there
21 are motions pending, anyway.

22 MS. WHALEN: Thank you, Your Honor.

23 MS. ALOMAR: Thank you, Your Honor.

24 MR. GOLDSMITH: Thank you, Your Honor.

25 (Proceeding Concluded.)